

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER No. 380 of 2004

Ramesh Manilal Shah .. Appellant
versus
Mona Mukund Vaidya & ors. .. Respondents

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Mr.R.M. Haridas i/b P.N. Joshi for the appellant.

MrR.V. Pai i/b S.S. Kulkarni for respondent nos.1 to 3.

CORAM : D.G. KARNIK, J

DATED : 23rd November 2006

P.C.:

1. Heard learned counsel for the parties.
2. This appeal is filed by the purchaser of the property challenging the order passed by the lower appellate court dated 18th December 2003, reversing the decision of the trial court on the preliminary issue, and

holding that the suit is maintainable.

3. Respondent no.4 purporting to act as a Karta of the joint family, sold the suit property to the appellant. Respondent nos.1 to 3 being the wife and children of respondent no.4 filed a suit for setting aside the alienation and for partition of the suit property. The trial court held that the mother was not entitled to file the suit on behalf of the minor children and only the manager was entitled to file the suit. The lower appellate court reversed the said decision which is impugned in this appeal.

4. Respondent no.3 is a minor son of respondent no.4. Being the son, as a coparsner he is entitled to file a suit for partition and setting aside the alienation. Since the father himself alienated the property, the respondent no.3 sued through his mother as a guardian and next friend. I fail to see how the suit by the minor through his mother and next friend for partition of the suit property is not maintainable.

5. Counsel for the appellant referred to the decision of the Supreme Court in Sunil Kumar & Anr. Vs. Ram Parkash reported in AIR 1988 SC 576 and contended

that a suit by a minor through his mother against the father (karta) was not maintainable. In that case, it was held that a suit for injunction against the father who was the Karta of the family, restraining him from alienating the house for legal necessity was not maintainable. In my view, the decision has no application to the facts of the case. In that case an injunction was sought to prevent an alienation for legal necessity. Here, the suit is for partition of the joint family property, by setting aside the alienation which is alleged to have been made without any legal necessity. Whether there existed a legal necessity or not is a question of fact which can only be decided at the trial and suit cannot be said to be bad in law at the preliminary stage. Thus, there is no merit in the appeal which is hereby dismissed.

(D.G. KARNIK, J)